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Supreme Court of the United States

OCTOBER TERM, 1950

No. 565

RADIO CORPORATION OF AMERICA, NATIONAL BROADCASTING COMPANY, INC., RCA VICTOR DISTRIBUTING CORPORATION, *et al.*,

Appellants,

against

UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, AND COLUMBIA BROADCASTING SYSTEM, INC.,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

REPLY OF APPELLANT EMERSON RADIO AND PHONOGRAPH CORPORATION TO MOTION TO AFFIRM.

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REPLY OF APPELLANT EMERSON RADIO AND PHONOGRAPH CORPORATION TO MOTION TO AFFIRM.

Appellant Emerson Radio and Phonograph Corporation herewith submits its Reply to the Motion to Affirm filed by the United States of America, the Federal Communications Commission and the Columbia Broadcasting System, Inc., appellees herein.

Appellees' Motion suggests that this Court affirm, *without argument*, the summary judgment of the three-judge District Court which, with one judge dissenting, denied a

permanent injunction restraining enforcement of the FCC order here under review; the challenged FCC order provides for the adoption of CBS standards for the transmission of color television, to the exclusion of the standards—compatible with existing black-and-white television transmission standards—proposed by the Radio Corporation of America.

Appellees' Motion also suggests—by way of footnote and with a degree of diffidence whose wider use might have lent charm to appellees' prayer for summary affirmance—that the appellants, including Emerson, the instant appellant, and excepting only RCA, are without standing to appeal to this Court.

This Reply will address itself in turn to each of appellees' twin suggestions:

1. The Suggestion That This Court Summarily Affirm

The challenged order of the FCC is not a routine order subject to ready correction as time reveals its error. This order may irrevocably congeal the character of television for generations to come. Once the system contemplated by the order is established, it can no more readily be changed than the gauge of United States railway trackage. A commission possessed of a modicum of respect for the opinion of others, or exhibiting the normal humility of any finite mind which entertains the philosophical question whether it might be wrong, would not obstruct, but would indeed solicit the most careful review of its judgment in order to afford the country the maximum degree of assurance that its decision is free of detectible error. It is frightening to observe in the FCC such stout resistance

to the reexamination of its oracular edict—a resistance exhibited in the court below by the FCC's refusal to consent to a stay of its order while that court deliberated upon the issues; a resistance exhibited here by the making of this motion for summary affirmance. Congressional policy as reflected in the Administrative Procedure Act and in the debates which led to its enactment is designed to put a tight curb upon claims to administrative omniscience rather than to give those claims the free rein sought by the FCC.

This Court has had prior occasion to examine the "provisions for judicial review in the [Communications] Act of 1934 * * * Section 402(a) makes the provisions of the Urgent Deficiencies Act of October 22, 1913 . . . pertaining to judicial review of orders of the Interstate Commerce Commission, applicable to 'suits to enforce, enjoin, set aside, annul, or suspend any order of the [Federal Communications] Commission under this Act . . .' * * * The Urgent Deficiencies Act, which is thus incorporated in § 402(a) of the Communications Act of 1934, provides for review in a specially constituted district court, with direct appeal to this Court." *Scripps-Howard Radio* v. *Federal Communications Commission,* 316 U. S. 4, 7.

Relying on the quoted language, and on the decisions of this Court in *Columbia Broadcasting System, Inc.* v. *United States,* 316 U. S. 407 and *National Broadcasting Company* v. *United States,* 319 U. S. 190, appellants sought review of the challenged FCC order in a three-judge United States District Court. That court took jurisdiction of the cause. That court recognized the substantial character of appellants' challenges to the order: the court evidenced this recognition in the fact that it restrained enforcement of the order pending decision; in the fact that after decision

it continued the temporary restraint pending appeal to this Court; in the fact that its stated alternative to summary judgment for appellees was "to vacate the order and send the proceeding back to the Commission for further consideration . . .," and that the court rejected the latter course only because of its conviction that "the interests of all . . . will be better served with this controversy on its way up rather than back from whence it comes"; and in the fact that one member of the court dissented with vigor from the denial of a permanent injunction.

But the District Court, although it observed the rituals of judgment, withheld the substance of the decisive safeguard against administrative excess—the safeguard guaranteed by statute and by the quoted language of this Court—"judicial review". The District Court was in a sense overwhelmed by its discovery that the widespread legal and and public importance of the issues raised by appellants rendered this a "controversy which badly needs the finality of decision which can be made only by the Supreme Court." For the District Court, believing on heretofore good authority that "any decision we make is appealable to [the Supreme Court] as a matter of right," sloughed off its robes of office to view in tranquility what it chose to regard as "little more than a practice session where the parties prepare and test their ammunition for the big battle ahead.". Resolute to unravel the last faded remnant of its authority, the District Court completed its own abdication and its careful frustration of the statutory scheme by shifting to this Court the District Court's primary and prescribed responsibility for the judicial review of administrative action. With notable candor, the District Court announced that "in studying the case, we have been unable to free our minds of the ques-

tion as to why we should devote the time and energy which the importance of the case merits, realizing as we must that the controversy can only be finally terminated by a decision of the Supreme Court."

Consonant with its forthright policy of indecision, the District Court failed to resolve the following substantial questions which (together with other questions presented with greater particularity in appellants' Statement as to Jurisdiction and in the joint RCA-NBC-RCA Victor Reply to Motion to Affirm) now confront this Court virtually as problems of first instance:

(1) *Whether substantial evidence supported the FCC's adoption of the CBS color television transmission standards.* (The District Court's premise for avoidance of this issue—its statement that "While the findings of the Commission are severely criticized, it is not contended in the main that they are not supported by substantial evidence"—is undermined by appellees' admission in their Motion to Affirm that appellants "urged in the Court below, and urge here, that there was no substantial supporting evidence . . .").

(2) *Whether, assuming* arguendo *that the FCC had a substantial evidentiary basis for adopting CBS color, the FCC had any warrant either in the record before it and the findings and conclusions made thereon or in the Communications Act for its extraordinary action in conferring a color television monopoly on CBS by barring the concurrent adoption of the compatible RCA standards.* It is submitted that nothing in the FCC's findings and conclusions, and nothing in the evidence before the FCC, demonstrates that the FCC considered, and found adequate reason for rejecting, the simultaneous adoption of the RCA standards.

Appellees' conjectural justifications for the exclusive adoption of one set of standards seem unpersuasive at best, in view of the clear Congressional mandate that "the field of broadcasting is one of free competition." *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U. S. 470, 474. See *National Broadcasting Company* v. *United States*, 319 U. S. 190; cf. 47 U. S. C. §§ 311, 313, 314. But appellees' retrospective itemization of possible benefits derived through suppression of competition is in any event irrelevant: the FCC's order must be tested against the record before the FCC *and the findings and conclusions which the FCC based upon that record.* "Its action must be measured by what the Commission did, not by what it might have done * * * The Commission's action cannot be upheld merely because findings might have been made and considerations disclosed which would justify its order as an appropriate safeguard for the interests protected by the Act. There must be such a responsible finding * * * There is no such finding here." *Securities and Exchange Commission* v. *Chenery Corporation*, 318 U. S. 80, 93-94. It is further submitted that the FCC was in any event without jurisdiction to bar the RCA standards, for it is not questioned that the RCA standards yield completely satisfactory black-and-white pictures on existing receivers, and the Commission is only empowered to regulate "the kind of apparatus to be used with respect to its external effects and the purity and sharpness of the emissions from each station and from the apparatus therein." 47 U. S. C. § 303(e). The fact that these black-and-white pictures can be converted into color at the option of the viewer (by an alteration of his receiver set) is of no legitimate concern to the FCC, which concededly is without jurisdiction over the manufacture of receiving apparatus.

(3) *Whether the FCC acted arbitrarily and without due regard for the public interest in not concluding that the art of color television was not sufficiently advanced to justify the final adoption of any of the proposed color television transmission standards.*

(4) *Whether the FCC order is void in that it was expressly premised on the non-compliance by television set manufacturers and television broadcasters with two conditions which the FCC was wholly without authority to impose.* The FCC order adopting CBS color (announced in the FCC's Second Report) was the product not of administrative decision but of administrative frustration. For in the FCC's First Report the FCC concluded that its preferred course of action would be to postpone final adoption of CBS color pending the acquisition of further information on the rapid technical advances being made. However, assertedly to avoid aggravation of the problem of compatibility (through continued proliferation by set manufacturers of the existing type of television receiver which cannot, without expense alterations, receive CBS color transmissions either in color or in black-and-white), the FCC conditioned postponement of a final order adopting CBS color as follows: (1) first, the proposed postponement was expressly conditioned on broadcasters' acceptance "without a hearing" of alteration of existing black-and-white transmission standards to include the so-called "bracket standards" capable of transmitting CBS color for receipt in monochrome on appropriately adapted receiving sets; (2) second, the proposal was further expressly conditioned on commitments from the set manufacturing industry to "build all their television receivers so as to be capable of operating within the above brackets." The first condi-

tion, in attempting the alteration without a hearing of long-prevailing engineering standards, clearly violated elementary procedural limitations binding on the FCC, since the FCC "must conform to the Administrative Procedure Act which prescribes uniform rule-making practices for Federal agencies to follow." *Sixteenth Annual Report, Federal Communications Commission*, p. 14. The second condition, in attempting to assert authority over television set manufacturers (including appellant Emerson), exceeded the substantive powers of the FCC, since that agency "does not license . . . receiving sets . . . nor does it regulate their manufacture or sale." *Sixteenth Annual Report, Federal Communications Commission*, p. 101. Nevertheless, when set manufacturers proved both unable (within the allotted time) and unwilling to comply with the FCC's purported exercise of dominion over them, the FCC made good its threat by forthwith ordering the exclusive adoption of the CBS color standards. Thus, even if it be assumed that the FCC order is otherwise unassailable, the fact that the order was premised on an abortive exercise of power which the FCC does not possess vitiates the order, for "an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained." *Securities and Exchange Commission* v. *Chenery Corporation*, 318 U. S. 80, 95.

Appellants, having raised many questions and having received few answers in the "practice session" conducted by the District Court, have come to this Court as of right. Here appellants are met by a motion for summary affirmance of the judgment below—a motion buttressed by the bland assertion that "it is evident that no substantial ques-

tion of fact or law is raised by this appeal." It is submitted that each of the questions outlined above (and each of the many questions presented in the Statement as to Jurisdiction and in the joint RCA-NBC-RCA Victor Reply) is "substantial" and is entitled to full argument and briefing before this Court.

Moreover, it is submitted that, because of the peculiar history of this cause in the District Court, the substantial errors conventionally assigned on appeal are here underlined by a more penetrating error which is decisive against appellees' motion for summary affirmance. That error, which is unrelated to the legal merits of the judgment of dismissal below, is the failure of the lower court to accord appellants the "judicial review" which is their due. For Congress has established an administrative agency upon which it has conferred large and yet carefully delineated powers over great segments of the communications industry. "Congress has also provided for judicial review as an additional assurance that its policies be executed." *United States* v. *Carolina Freight Carriers Corporation*, 315 U. S. 475, 489. Congress has indeed gone further and has taken occasion to define, in accordance with settled Anglo-American legal principles, the character of the "judicial review" to which "[a]ny person suffering legal wrong because of any agency action shall be entitled . . ." 5 U. S. C. A. § 1009(a). "So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse

of discretion, or otherwise not in accordance with law . . . in excess of statutory jurisdiction, authority, or limitation, or short of statutory right . . . without observance of procedure required by law . . . unsupported by substantial evidence. . . ." 5 U. S. C. A. § 1009(e).

It is submitted that the "judicial review" described above has thus far eluded appellants. They have not yet had their day in court.

2. The Suggestion That Emerson Has No Standing To Appeal

Emerson, a manufacturer of television receiving sets, petitioned the FCC for permission to intervene in and give testimony at the FCC hearings on color television which were the basis for the FCC order here under review. This petition was denied.

At the institution of the instant suit, Emerson, over the objection of appellees, petitioned for and was granted permission to intervene as a party plaintiff.

After the District Court's dismissal of the complaints herein, Emerson joined with the other parties plaintiff and perfected the instant appeal.

The appellate status of Emerson, as well as that of the other appellants in the instant action, rests on 28 U. S. C. § 1253:

> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

Emerson is of course a party plaintiff of record, and accordingly is a proper party appellant within the letter of the relevant statute.

But, presumably by way of collateral attack on Emerson's appellate standing, appellees repeat the contention that the District Court erred in permitting Emerson to intervene as a party plaintiff. In view of the express provisions of 28 U. S. C. § 2323 (derived, like 28 U. S. C. § 1253, *supra*, from the Urgent Deficiencies Act), it would seem clear that Emerson was properly granted intervention as a party plaintiff:

> "... any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party.
>
> "Communities, associations, corporations, firms, and individuals interested in the controversy or question before the Commission, or in any action commenced under the aforesaid sections may intervene in said action at any time after commencement thereof."

The foregoing language does not merely make frivolous any contention that the lower court abused its discretion if it allowed Emerson to intervene as a permissive intervenor. See Rule 24 of the Federal Rules of Civil Procedure. On the contrary, the first quoted sentence of § 2323 compels the conclusion that the lower court quite properly regarded Emerson as an intervenor as of right on the ground that the FCC had erred in excluding Emerson from participation in the administrative proceedings. Emerson, as a set manu-

facturer, sought to intervene in the FCC hearings to testify against certain proposed color television transmission standards on the basis of which its "competitive advantage was threatened. Having this interest, [it was] entitled to intervene in that administrative proceeding. And if [it] did so, [it] became entitled under § 212 of the Judicial Code [present 28 U. S. C. § 2323] to intervene, as of right, in any suit 'wherein is involved the validity' of the order entered by the Commission." *Alexander Sprunt* v. *United States*, 281 U. S. 249, 254-255. The fact that the FCC refused to recognize Emerson's right to participate in the FCC hearings could not operate to deny Emerson future standing to intervene as of right as a party plaintiff in opposition to the FCC order, for denial of an absolute right of intervention is remediable by and itself confers standing to appeal. *Brotherhood of Railroad Trainmen* v. *Baltimore & Ohio R. Co.*, 331 U S. 519. In any event, whether Emerson be viewed as a permissive intervenor or as an intervenor as of right, Emerson was on either basis a proper party plaintiff in the lower court and is accordingly a proper party appellant here. As this Court noted in careful scrutiny of the Urgent Deficiencies Act (whose successor statutes form the basis of the present appeal), "Other sections permit . . . complainants before the Commission, or any party in interest in a proceeding before that body, or any other interested party, to become parties to a suit involving the validity of an order of the Commission . . . and accord to any aggrieved party the right of appeal to this Court." *Interstate Commerce Commission* v. *Oregon-Washington R. & Nav. Co.*, 288 U. S. 14, 23-24.

Nor is any of the cases cited by appellees authority for a denial of appellate standing to Emerson or to any of the

other appellants. The cases relied on as authority for dismissal of the appeal (as to every appellant but RCA) are, for the most part, variants of the classic rule of *Massachusetts* v. *Mellon*, 262 U. S. 447, denying the existence in the private citizen of an inherent common-law right to challenge Government conduct; the applicability of these cases to a specific statutory scheme for judicial review of administrative action is not readily apparent. The single relevant case cited by appellees is *Alexander Sprunt* v. *United States*, 281 U. S. 249. But that case is support for rather than repudiation of the standing to appeal of Emerson and the rest of the challenged appellants. For Justice Brandeis there held for this Court that an intervenor in a three-judge court action who was without standing to initiate the action independently had no standing to appeal from dismissal of the cause *where the principal plaintiff failed to appeal*. *Cf. Interstate Commerce Commission* v. *Oregon-Washington R. & Nav. Co.*, 288 U. S. 14. A similar rule bars the intervenor with no independent interest to assert, from appealing *independently* of the principal plaintiff. *Boston Towboat Co.* v. *United States*, 329 U. S. 632. In the instant case, however, the principal plaintiff—RCA—is appealing, and appellees do not challenge RCA's manifest standing to appeal; accordingly, since the other appellants were proper parties plaintiff below and have joined with RCA in a single appeal in this Court, all the appellants are properly before this Court.

CONCLUSION

It is urged that the Motion to Affirm be overruled, and that the appeal be set down for argument before this Court.

Respectfully submitted,

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